No. 84-1704, No. 84-1700, and No. 84-1640

In The

Supreme Court of the United States

October Term, 1984

MARSHALL MECHANIK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

JEROME OTTO LILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

MARSHALL MECHANIK, ET AL.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Reply Brief

WHEN THE PROSECUTION VIOLATES RULE 6(d) AND THEN MISREPRESENTS THEIR COMPLIANCE WITH THE ONLY RULE GOVERNING GRAND JURY PROCEDURE AT THE PRETRIAL STAGE, DISMISSAL OF THE INDICTMENT IS THE ONLY APPROPRIATE REMEDY.

Simply stated, the only issue which this Court need decide is whether the entire indictment should have been dismissed when Federal Rule of Criminal Procedure 6(d) was violated and pre-trial judicial determination of the issue was stifled by the prosecution. The Government needlessly complicates this case by inviting the Court to examine the Rule 6(d) violation in the context of a "procedural irregularity" followed and dwarfed by the uninfected trial and conviction. In doing so, the Government ignores the basic fact that had the Government responded accurately regarding the Rule 6(d) violation prior to trial, the entire superseding indictment would have been dismissed. *United States v. Lill*, 511 F.Supp. at 51 (S.D. W.Va. 1980).

The issue before this Court, the remedy for violation of Rule 6(d), must be first examined in light of the record in this case, without regard to the events that occurred following the Government's misrepresentation of compliance with Rule 6(d). Ironically, the Government suggests pretrial prosecutorial notification or certification to the dis-

trict court that the rules have been observed, as a remedy that would insure prospective compliance with Rule 6(d). (Gov't. Brief pages 12 and 25). Consideration of the trial and convictions obtained, in fashioning the remedy in this case, rewards the prosecution for the pre-trial misrepresentation of their compliance with Rule 6(d) in the face of the prosecution's clear violation and their pushing the case to trial without disclosure to the judge of the violation.

The Government argues (Gov't. Brief page 15) that a violation of Rule 6(d) cannot form the basis for dismissing an indictment. The logical consequences of the Government's argument would, at worst, abrogate the constitutional function of the grand jury as an investigative body independent of coercive control by the Government, and, at best, would require this Court to judicially render meaningless the strictures of Rule 6(d). No policy argument, and certainly no case cited by the Government, requires such results.

The Fifth Amendment to the Constitution provides for the grand jury. Its integrity must be maintained for the grand jury to discharge its duties. The grand jury is dependent upon the prosecutor to comply with Rule 6(d) in presenting the evidence. Absent its integrity, the grand jury cannot properly perform its screening functions either to discover and present persons for trial or to protect citizens against arbitrary governments actions. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

Federal Rule of Criminal Procedure 6(d) is one of the keystones to preserving the integrity of the grand jury system. Only one witness is allowed in the grand jury room at one time so the Government cannot simply over-

whelm the grand jurors. See *United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977). If the Government is correct, the Rule 6(d) prohibition would simply disappear. Dismissal of the indictment for a violation of Rule 6(d) is required to maintain the appearance, as well as the actuality, of propriety[1]. Nor can there be a "windfall" to a defendant, as the Government suggests (Br. 33), where the Government merely follows the strictures of due process. The only "windfall" which this Court can confer in this case is upon the Government.

If the Government prevails in this case, then all it needs to do to insulate abuses of the grand jury system is keep such abuses hidden until after the trial begins! Once trial begins, according to the Government (Br. 33-35), the doctrine of harmless error applies, and it is extremely unlikely that the indictment will then be dismissed, because the only prejudice is the existence of the trial itself, and that is not objectionable since the existence of the trial itself cures the abuse. The Government's argument is bootstrapping on a grand scale, and should not be judicially en-

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[1]The Government has failed to consider in its cost-benefit analysis approach to choosing a proper remedy for a violation of Rule 6(d) (Br. 20-27), the "costs" of such violations to the grand jury system itself, and the benefits to society through a fair and even application of the due process of law. In addition, the Government has also overstated the "costs". The Court has recognized that reversal of a conviction and dismissal of an indictment where the integrity of the grand jury has been undermined is not at all a drastic remedy, because the accused can be reindicted and tried. *Rose v. Mitchell*, 443 U.S. 545, 557-558 (1979). It certainly is far more drastic to undermine a thousand years of legal development by judicially altering the grand jury system.

dorsed. An incentive for the Government to abuse the process must be contrary to public policy as abhorrent to the notion of due process of law.

In determining the proper remedy, this Court must certainly weigh the attendant costs and benefits. Conspiciously absent from any cost benefit analysis suggested by the Government in their brief is the consideration that one cost attendant upon applying a harmless error test in this case is the reward to the prosecution for their pretrial misrepresentation. Also conspiciously absent from the Government's argument is the benefit, resulting from per se dismissal without prejudice, to the criminal justice system that the only rule in place controlling the prosecution has a remedy of sufficient strength to encourage compliance by the party charged with the significant responsibility of presenting the case to the grand jury. Per se dismissal, in this case, is the only remedy enforceable without endorsing a procedure that otherwise jeopardizes secrecy or requires inquiry into the evidence presented to the grand jury. *Costello v. United States*, 350 U.S. 359 (1956).

No case cited by the Government even comes close to sanctioning the result sought by it. The four recent lower court cases the Government uses (Br. 44) to support its argument are inapposite. *United States v. Kazonis*, 391 F. Supp. 804 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.), cert. denied, 429 U.S. 826 (1975), did not concern a violation of Rule 6(d). The other three cases, *United States v. Rath*, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969); *United States v. Kahan & Lessin Co.*, 695 F.2d 1122 (9th Cir. 1982); and *United States v. Condo*, 741 F.2d 238 (9th Cir. 1984), cert. denied, No. 84-5793

(Jan. 14, 1985), concerned brief, unintentional interruptions of the grand jury (*Rath* and *Kahan & Lessin Co.*) or a "fleeting" appearance in the grand jury room by a person assisting in the movement of bulky documents (*Condo*). None of these cases involved the presentation of more than one witness to the grand jury.[2]

The Government's primary reliance upon *Costello v. United States*, 350 U.S. 359 (1956), and *United States v. Morrison*, 449 U.S. 361 (1981), also is misplaced. In *Costello*, this Court ruled that it was proper for a grand jury to return an indictment based upon hearsay evidence. The use of hearsay evidence does not affect the integrity of the grand jury, nor does it subvert the role of the grand jury as an independent decision maker. The rule sought by the Government would do both these things.

United States v. Morrison, supra, merely stands for the proposition that "remedies should be tailored to the injury suffered . . ." *Id.*, at 364. In that case, the respondent moved to dismiss her indictment on grounds that, subsequent to her indictment, two Drug Enforcement Agency agents violated her Sixth Amendment right to counsel. The respondent entered a conditional plea of guilty, and the court of appeals reversed the conviction. This Court reversed the court of appeals, holding that dismissal of the indictment was not the proper remedy for a Sixth Amend-

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[2]It is possible that these cases were mischaracterized by the courts which decided them, since a brief, inadvertent intrusion into the grand jury room may not constitute a violation of Rule 6(d), at all. This must have been implicitly recognized by the court of appeals below when it distinguished this case from *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (1982), cert. denied, 459 U.S. 1105 (1983).

ment violation which "had no adverse impact upon the criminal proceedings." *Id.*, at 367. We agree. Unlike this case, the violation in *Morrison* had nothing to do with the grand jury. The violation by the Government of a right unconnected with the grand jury, which violation occurred after the indictment was handed down, was properly considered in terms of the trial, and not as a violation of the grand jury system. Hence, the proper scope of inquiry was prejudice to the respondent. In this case, the Government abused the grand jury itself, and, therefore use of the *Morrison* analysis is inapproproiate.

The case most like this one is *Rose v. Mitchell*, 443 U.S. 545 (1979). Despite the best efforts of the Government (Br. 34-39) to distinguish this case from *Rose*, both cases present the principle that an indictment must be dismissed when the Government has tampered with the concept of fundamental fairness and the integrity of the grand jury.[3]

As in *Rose*, the Petitioners here raised the grand jury issue prior to trial; it was not their fault that a trial on the flawed indictment occurred. Hence, reversal of the conviction is required, in addition to dismissal of the indictment, only because the trial occurred in error. A breach of the integrity and independence of the grand jury cannot be "cured" by a subsequent trial.[4]

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[3]That principle also underlies the decision in *Costello v. United States*, 350 U.S. 359, 362 (1956).

[4]The Government is just plain wrong (Br. 35) when it contends there is no "unbroken line of cases" establishing a precedent for violations of Rule 6(d). We have cited such a line of cases (Br. 10, N. 9), holding that the presence of an unauthorized person in the grand jury room for any significant duration of time mandates dismissal of the entire indictment.

Accordingly, the judgment of the court of appeals should be affirmed insofar as it reversed the conspiracy convictions, and reversed insofar as it affirmed the substantive convictions.

Respectfully submitted,

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